IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1369

BEINE J. BURRELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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April 30, 1975

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(b) This Court has not yet determined whether the federal Criminal Justice Act or Court Rules provide a right to appointment of counsel for a reduction-of-sentence motion. The Court of Appeals' decision denying such a right is contrary to the well-established construction given the Act by the Administrative Office of the United United States Courts, which is the agency charged with implementation of the Act. 7

2. Petitioner Burrell also has a due-process right to counsel, because his motion to reduce sentence raised substantial claims of post-sentencing rehabilitation, education, good prison behavior, availability of a work-release job, and that he would be eligible for work-release only if his sentence were reduced. The Court of Appeals' decision, refusing to recognize this right to counsel and holding that post-sentencing rehabilitation et alia are not relevant considerations, misconstrues and misapplies this Court's decision in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and other cases. 10

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IN THE

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No.

BEINE J. BURRELL,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The petitioner, Beine J. Burrell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals, entered in this case on January 30, 1975.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals below is reported at 332A.2d 344 (1975). No

opinion was rendered by the District of Columbia Superior Court. Its order and the Court of Appeals' opinion and judgment are printed in Appendix A hereto.

JURISDICTION

The judgment of the District of Columbia Court of Appeals Court was entered on January 30, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether an indigent, imprisoned defendant, who requests appointment of counsel, is entitled thereto on his motion for reduction of sentence, either (a) under the Fifth and Sixth Amendments or (b) under the Criminal Justice Act, 18 U.S.C. 3006A (1970), or Court Rules.

2. Whether, as a matter of due process, counsel should have been appointed in this case, where petitioner Burrell's *pro se* motion to reduce sentence raised substantial claims of post-sentencing rehabilitation, education, good prison behavior, availability of a work-release job, and eligibility for work-release only if his sentence were reduced.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitutional provisions involved are the due-process clause of the Fifth Amendment and the right-to-counsel clause of the Sixth Amendment. The statute involved is the Criminal Justice Act, 18 U.S.C. 3006A (1970). The Court Rules involved are Rule 35(a), D.C. Superior Court Criminal Rules (identical to Federal Criminal Rule 35), and Rule 44, D.C. Superior Court

Criminal Rules, substantially identical to Federal Criminal Rule 44(a). The relevant provisions are printed in Appendix B hereto.

STATEMENT OF THE CASE

The Petitioner Burrell was convicted in the Superior Court of the District of Columbia of possessing a pistol without a license, in violation of D.C. Code, §22-3204. He was sentenced to a term of imprisonment of one to three years, to run consecutively to another sentence previously imposed. Petitioner Burrell appealed, but then voluntarily dismissed his appeal on his own motion on October 12, 1972. Thereafter and within the 120 days required by Rule 35(a) of the D.C. Superior Court Criminal Rules (identical to Federal Criminal Rule 35), petitioner filed a *pro se* motion for reduction of sentence, together with supporting *pro se* papers. Accompanying this *pro se* motion was petitioner Burrell's letter to the court stating in part:

> "I do not have a lawyer, and I would like to have a lawyer appointed to represent me for this Motion."

The trial court ignored this request and denied the motion without a hearing and without stating any grounds for its refusal to appoint Counsel.

Petitioner appealed to the District of Columbia Court of Appeals. The court rejected petitioner Burrell's claim to have a Constitutional right to appointed counsel at the motion-for-reduction-of-sentence stage of the criminal proceeding against him. The D.C. Court of Appeals went on to hold that petitioner Burrell had no right to appointed counsel under the Criminal Justice Act, 18 U.S.C. 3006A (1970), or Court Rules, on his motion for reduction of sentence.

The Court of Appeals acknowledged a due-process right to appointed counsel where the sentence-reduction motion raises "relevant" considerations (without specifying what considerations it might consider relevant). But the court held that "Such post-sentencing developments" as "rehabilitation and good prison behavior," as well as education, availability of a work-release job, and eligibility for work-release only if his sentence were reduced, "are not considerations relevant to sentencing" but are "more appropriately considerations for the Board of Parole . . ." 332 A.2d at 346.

REASONS FOR GRANTING THE WRIT

1.(a) This Court has not yet Determined the Important Constitutional Question Whether a Motion for Reduction of Sentence is a "Critical Stage" of a Criminal Prosecution Requiring Appointment of Counsel. The Court of Appeals' Decision Denying the Constitutional Right to Appointed Counsel at this Stage is not in Accord With This Court's Whole Series of Right-to-Counsel Decisions.

This Court has held that the indigent defendant in a criminal case "requires the guiding hand of counsel at every step in the proceedings against him" (*Powell v. Alabama*, 287 U.S. 45, 69 (1932)) and has the right, under the Sixth Amendment, to have counsel appointed for him in every Court in the United States in every criminal case involving the possibility of imprisonment. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938). This Court has held that the right to appointed counsel applies at preliminary examination

(*Coleman v. Alabama*, 399 U.S. 1 (1970); *White v. Maryland*, 373 U.S. 59 (1963)); at arraignment (*Hamilton v. Alabama*, 368 U.S. 52 (1961)); at post-indictment lineup (*United States v. Wade*, 388 U.S. 218 (1967)); at custodial interrogation (*Miranda v. Arizona*, 384 U.S. 436 (1966)); throughout the period from arraignment to trial, (*Massiah v. United States*, 377 U.S. 201 (1964)); at initial sentencing (see *Townsend v. Burke*, 334 U.S. 736 (1948)); at court proceedings for deferred sentencing or revocation of probation ((*Mempa v. Rhay*, 389 U.S. 128 (1967)); at the fixing of final sentence (*United States v. Behrens*, 375 U.S. 162 (1963)); and on initial appeal of right (*Douglas v. California*, 372 U.S. 353 (1963)). This Court held that each of these was a "critical stage" of the criminal proceedings.

This Court has not yet faced the precise issue of whether an indigent defendant is entitled to counsel at a motion to reduce sentence. But, we submit, the whole series of right-to-counsel decisions cited above leaves little doubt that a reduction-of-sentence motion is likewise a "critical stage," because it is a stage of the criminal proceedings at which substantial rights of the accused may be affected. Indeed, the most important right of the accused in the whole criminal-law process, the final adjudication of the right to liberty itself, is involved in the reduction-of-sentence motion.* For "Rule 35 is

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* Gerstein v. Pugh, ___ U.S. ___, 43 U.S. Law Week 4230, 4235, 4237 (Feb. 18, 1975) involved "only the *first* stage of an elaborate system." That first stage was a preliminary, non-adversary, probable-cause determination "pending further proceedings", which could be made by a magistrate "either before or promptly after arrest", and which could be promptly reviewed, in adversary proceedings requiring appointed counsel, either on a writ of habeas corpus or at a preliminary hearing, detention hearing, first appearance or adjourned first appearance.

[footnote continued]

intended to give every convicted defendant a second round before the sentencing judge, and at the same time, it affords the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim." *United States v. Ellenbogen*, 390 F.2d 537, 543 (2d Cir. 1968).

The D.C. Court of Appeals' statement that petitioner Burrell "had run the gamut of the adjudicatory process" (332 A.2d at 345) is obviously incorrect. The Rule 35 reduction-of-sentence motion is addressed to the sentencing judge. It is as much a part of the adjudicatory process, and every defendant has as much right to make such a motion, as he has the right to appeal.

The Court of Appeals' reliance upon *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), evidently flows from its erroneous categorization of the reduction-of-sentence motion as being outside rather than a part of the adjudicatory process. That reliance is misplaced and leads the Court of Appeals to an unwarranted extension of this Court's holding in *Gagnon*, as well as an undue restriction on this Court's holdings in the right-to-counsel cases, particularly *Mempa v. Rhay, supra*. In *Gagnon*, this Court distinguished *Mempa* precisely on the grounds that the probation revocation proceeding in *Gagnon*, unlike that in *Mempa*, was (1) "not a stage of a criminal prosecution," and (2) was and should remain an informal, administrative proceeding possessing "significant interests in informality, flexibility and economy," rather than a court proceeding. A motion for reduction of sentence is

Here, by contrast, the motion for reduction of sentence is the accused's *last* chance to appeal to the sentencing judge's otherwise essentially unreviewable discretion as to the length of the *final* sentence.

of course a stage of the criminal prosecution, and is of course a formal court proceeding.

What this Court said in *Mempa* about "the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence" (389 U.S. at 135) is of course equally applicable at the stage of a motion for reduction of sentence. In petitioner Burrell's case, counsel, having the necessary skill and mobility, could have obtained affidavits and subpoenaed live witnesses to substantiate Mr. Burrell's claims that, in the opinion of reliable persons in authority at Lorton Reformatory, he was fully rehabilitated; that a good job was waiting for him outside; and that he would be permitted to take that job if but only if his sentence were reduced. In short, counsel could have presented evidence to show a complete change of circumstances, fully justifying a reduced sentence.

(b) This Court has not yet Determined Whether the Federal Criminal Justice Act or Court Rules Provide a Right to Appointment of Counsel for a Reduction-of-Sentence Motion. The Court of Appeals' Decision Denying Such a Right is Contrary to the Well-Established Construction Given the Act by the Administrative Office of the United States Courts, Which is the Agency Charged with Implementation of the Act.

The Criminal Justice Act provides (18 U.S.C. 3006A (c)):

"A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings . . ."

And 18 U.S.C. 3006A(d)(2) provides that for "representation in connection with a post-trial motion made after the entry of judgment . . . compensation shall not exceed $250 for each attorney in each proceeding in each court."

Moreover, D.C. Superior Court Criminal Rule 44 (identical to Federal Criminal Rule 44(a) except for omission of the bracketed matter below) provides:

> "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before [the Federal magistrate or] the Court [through appeal], unless he waives such appointment."

In this case, the trial court duly appointed counsel for petitioner Burrell at the time of his initial appearance, and that counsel represented him through the filing of notice of appeal from his conviction. Thereafter the Court of Appeals duly appointed the undersigned counsel to represent him in that court. But after the case returned to the trial court following dismissal of that appeal on his own motion, the trial court simply ignored his request for appointment of counsel to represent him in connection with his post-appeal motion for reduction of sentence.

The Court of Appeals, grasping upon the phrase "through appeal," may have construed §3006A(c) "[not] to require the appointment of counsel to assist in the preparation of a *post-appeal* motion for a reduction of sentence" (332 A.2d at 347; emphasis added), although leaving it open that §3006A may require such appointment prior to appeal. There are a number of defects in such a construction. (1) This restrictive construction ignores the Congressional intent that the statute should be applied and construed liberally in favor of the right to appointed counsel. (2) This construction

leads to the absurd result that an indigent defendant who wins on appeal the right to retrial or rehearing would not be entitled to counsel at these post-appeal stages of the criminal proceedings. (3) This construction ignores and is irreconcilable with the specific reference in §3006A(d)(2) to "representation [by appointed counsel] in connection with a post-trial motion made after the entry of judgment." (4) This construction ignores the omission of the phrase "through appeal" in D.C. Superior Court Criminal Rule 44. (5) This construction creates an invidious and wholly arbitrary discrimination against those indigents whose reduction-of-sentence motions are filed post-appeal rather than after conviction but before or in lieu of appeal. Thus, this construction is to be avoided because, so construed, the statute would be of doubtful constitutionality under due-process, equal-protection principles.

Finally, this construction is wholly inconsistent with and contrary to the uniform and well-established construction given to the statute both by the District of Columbia's Criminal Justice Act Administrator and by the Administrative Office of the United States Courts. Those offices have adopted and they regularly and uniformly act upon the position that an attorney who represents an indigent on a motion for reduction of sentence is entitled to compensation under the Criminal Justice Act, without regard to whether the motion is made post-appeal or is made post-conviction but before or in lieu of appeal. In light of this consistent administrative practice, and in light of the short 120-day period within which a reduction-of-sentence motion may be made, explicit recognition by this Court of the right to appointed counsel for the reduction-of-sentence motion can be expected to result in only minimal, if any, increase

in cost and in judicial and lawyers' time. Such increase as there may be will help to implement the American Bar Association's Criminal Justice Standards on *The Defense Function*, that "the role of counsel [at sentencing] has been slighted in the past and ought to be expanded" and that "Defense counsel should present to the Court . . . all favorable information relevant to sentencing and . . . be prepared to suggest a program of rehabilitation based on his exploration of employment, educational and other opportunities made available by community services." (1970, p. 285 and §8.1(b).)

2. **Petitioner Burrell also has a Due-Process Right to Counsel, Because his Motion to Reduce Sentence Raised Substantial Claims of Post-Sentencing Rehabilitation, Education, Good Prison Behavior, Availability of a Work-Release Job, and that he Would be Eligible for Work-Release Only if his Sentence were Reduced. The Court of Appeals' Decision, Refusing to Recognize this Right to Counsel and Holding that Post-Sentencing Rehabilitation et Alia are not Relevant Considerations, Misconstrues and Misapplies this Court's Decision in Gagnon v. Scarpelli, 411 U.S. 778 (1973) and Other Cases.**

Despite its heavy (but, as we have shown in part 1(a) above, misplaced) reliance upon *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), in rejecting petitioner Burrell's sixth-amendment and statutory rights to appointed counsel, the Court of Appeals has failed to follow even *Gagnon's* basic, minimal, due-process standards. This Court's opinion in *Gagnon* states (411 U.S. at 791):

> "In every case in which a request for counsel . . . is refused, the grounds for refusal should be stated succinctly in the record."

Here, the trial court's brief, pro forma order failed even to mention petitioner Burrell's request for appointment of counsel, much less state grounds for its refusal.

The Court of Appeals sought to remedy this fatal deficiency by holding that "such post-sentencing developments" as "rehabilitation and good prison behavior," educational training while in prison, availability of a work-release job and "that he is prevented from realizing the foregoing 'only because his sentence in this case is to run consecutively to his previous sentence' " (332A.2d at 345) all are "not considerations relevant to sentencing." (332A.2d at 346). This holding flies in the face of the court's own approving quotation from The Policies and Standards for Sentencing adopted by the Ninth Circuit Court of Appeals (27 F.R.D. 390), that:

> "A proper sentence is a composite of many factors, including . . . the prospects for the rehabilitation of the offender, the possibility of a return of the offender to a normal life in the community, [and] the possibility . . . of training of the offender . . ."

Moreover, this holding is directly contrary to the Second Circuit Court of Appeals' statement in *United States v. Ellenbogen*, 390 F.2d 537, 543 (1968), that:

> "Rule 35 . . . affords the judge an opportunity to reconsider the sentence in light of any further information about the defendant or the case which may have been presented to him in the interim."

In addition the D.C. Court of Appeals' holding completely ignores and is contrary to this Court's recognition, in *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969),

that sentencing judges have great freedom "to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence" after retrial, and to resentence "in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' "

The D.C. Court of Appeals' argument that post-sentencing developments, such as rehabilitation, educational training and job opportunities, are somehow "not relevant" on a reduction-of-sentence motion simply because they happen to be "appropriately considerations for the Board of Parole" (332 A.2d at 346) is of course a *non-sequitur*. This Court answered such an argument over forty years ago, in *United States v. Benz*, 282 U.S. 304, 311 (1931):

> "We find nothing in the suggestion that the action of the district court in reducing the punishment after the prisoner had served a part of the imprisonment originally imposed was a usurpation of the pardoning power of the executive. The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the *enforcement* of the judgment, but does not alter it *qua* judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance."

Finally, the D.C. Court of Appeals' suggestion that sentencing judges may not reduce sentences because of post-sentencing developments would require judges to blind themselves to what all the rest of the world knows.

It would require them to act on the basis of what they know to be untruths. Such a doctrine is so far removed from accepted and usual standards of the search for truth in our system of justice as to call for the exercise of this Court's power of supervision.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue.

Respectfully submitted,

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April 30, 1975

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7175

BEINE J. BURRELL, a/k/a Ronald B. Burrell, APPELLANT,

v.

UNITED STATES, APPELLEE.

Judgment entered this date

Appeal from the Superior Court of the District of Columbia

(Argued October 16, 1973 Decided January 30, 1975)

George F. Bason, Jr., appointed by this court, for appellant.

Joseph B. Valder, Assistant United States Attorney, with whom *Harold H. Titus, Jr.*, United States Attorney, and *John A. Terry*, Assistant United States Attorney, were on the brief, for appellee.

Before NEBEKER, YEAGLEY and HARRIS, *Associate Judges.*

YEAGLEY, *Associate Judge*: This appeal follows a denial of appellant's pro se motion under Super. Ct. Cr. R. 35 for reduction of sentence, which was acted upon by the trial court without the appointment of counsel. The motion was filed after we granted appellant's motion to dismiss his appeal from the conviction of possessing

a pistol without a license. Appellant had been sentenced to serve a term of from one to three years to run consecutively to an earlier sentence resulting from a felony conviction.

He alleged as reasons for granting the instant motion that his superiors and others in authority at Lorton Reformatory are satisfied that he is rehabilitated and ready for release; that having served in excess of 40 months of his previous sentence he is eligible for work release or parole; that a neighborhood development center had made a work release job available to him in Washington, D.C.; that he is prevented from realizing the foregoing "only because his sentence in this case is to run consecutively to his previous sentence, therefore prompting a transfer to Lewisburg Penitentiary because of a Federal Sentence imposed." In his letter to the court clerk transmitting the motion he said, "I do not have a lawyer, and I would like to have a lawyer appointed to represent me for this Motion." The court, after reviewing the motion and the papers appended thereto and his presentence report, denied the motion without acceding to the request for appointment of counsel. We think the court acted correctly and affirm.

Appellant is not here questioning the court's action in denying the motion for a reduction of sentence. The sole issue raised on appeal is whether or not the court's failure to appoint counsel deprived him of his constitutional right to such representation at a critical stage of his prosecution.

Supreme Court decisions regarding an accused's right to counsel make it clear that appointment of counsel is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected, from custodial interrogation through trial and appeal.

Mempa v. Rhay, 389 U.S. 128 (1967). Here, however, appellant has already lost his liberty and his appeal has been dismissed. He asks that part of that liberty be restored.

This is not a situation where an indigent defendant needs legal representation to defend himself against governmental action; that is, it is not an action brought by the government against the defendant such as one to revoke probation[1] or to revoke his parole.[2] This proceeding resembles those only insofar as it likewise arose after trial, sentencing and appeal. It was initiated by one who had run the gamut of the adjudicatory process. Appellant here had the assistance of counsel at the sentencing stage, when both counsel and the appellant were accorded the right to speak. The sentence imposed was within the statutory limits. Furthermore, as we shall see, the motion did not present to the court an appropriate basis for reduction of sentence.

In the probation revocation case of *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Supreme Court held that it was error for the court of appeals to hold that the State has a constitutional duty to provide indigents with counsel in all probation or parole revocation cases. *Id.* at 787. The Court apparently was of the view that frequently there would be little to be resolved at such a proceeding, noting that in most cases such a movant "has been convicted of committing another crime or has admitted the charges against him." *Id.* (Footnote omitted.) It said, "The need for counsel at revocation hearings derives, not from the invariable attributes of

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[1] *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

[2] *Morrissey v. Brewer*, 408 U.S. 471 (1972).

those hearings, but rather from the peculiarities of particular cases." *Id.* at 789. The Court held:

> We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. . . . [T]here will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees. [*Id.* at 790.]

Although we are not faced with the motion of a probationer or parole violator, the problem we face is not entirely dissimilar. Further, we are not cited to any authority, and we know of none, holding that whenever one moves for a reduction of sentence he thereby becomes constitutionally entitled to counsel. It cannot be said that appellant has been deprived of a substantive right. There is no right to work release, which is the objective underlying his motion, any more than there is a right to a reduction of confinement time. *Green v. United States*, 157 U.S.App.D.C. 40, 481 F.2d 1140 (1973).

The matters alleged in the motion are not considerations relevant to sentencing [3] nor are they factors which

[3] The Policies and Standards for Sentencing adopted by the 9th Circuit Court of Appeals, July 8, 1960, 27 F.R.D. 390, provides:

> 3. A proper sentence is a composite of many factors, including the nature of the offense, the circumstances—extenuating or aggravating—of the offense, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of a return of the offender to a normal life in the community, the possibility of treatment or of training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the current community need, if any, for such a deterrent in respect to the particular type of offense involved.

would ordinarily be considered on a motion for reduction of sentence. The appellant's motion was based primarily on his alleged rehabilitation and good prison behavior. Such post-sentencing developments quite clearly represent the sort of factors that are more appropriately considerations for the Board of Parole in determining a prisoner's eligibility for parole. *United States v. Maynard*, 485 F.2d 247 (9th Cir. 1973); *State v. Dunn*, 282 A.2d 675 (N.H. 1971).

The question of whether the appellant had a statutory, as distinguished from a constitutional, right to counsel in this case under the Criminal Justice Act [4] was raised sua sponte by this court at oral argument. The pertinent statutory provision provides that:

> A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings. . . . [18 U.S.C. § 3006A(c) (1970).]

[4] 18 U.S.C. § 3006A (1970). The Criminal Justice Act is made expressly applicable in the District of Columbia in 18 U.S.C. § 3006A(l) (1970).

It is noted that this provision is for all practical purposes identical to section 2 of the District of Columbia Criminal Justice Act, Pub. L. No. 93-412, § 2 (September 3, 1974) (now codified as § 11-2603 of the D.C. Code). We do not construe § 3006A(c) to require the appointment of counsel to assist in the preparation of a post-appeal motion for a reduction of sentence. We agree with the court in *Dirring v. United States*, 353 F.2d 519, 520 (1st Cir. 1965), that "[a]fter final conviction the appointment of counsel must rest in the discretion of the court."

Nor do we find that the law in this regard was changed when Congress amended § 3006A(c) in 1970 by adding the phrase "including ancillary matters appropriate to the proceedings." The legislative history of this amendment indicates that it was not intended to change existing law, but rather to clarify it and insure that compensation was available to appointed counsel for remedies technically outside the scope of the trial such as *habeas corpus ad testificandum* and mental competency hearings.[5] There is no indication that the amendment was intended to create a statutory right to counsel to aid in the filing of motions after final conviction.[6] The appointment of

[5] 2 U.S. Code Cong. & Ad. News 3989 (1970). We also note in this regard that the trial court in *Green v. United States, supra,* denied the pro se motions for reduction of sentence filed by two prison inmates. The Circuit Court subsequently denied the pro se motions for leave to proceed on appeal in forma pauperis filed by both inmates. No mention was made in that case of a statutory right to counsel under amended § 3006A(c).

[6] This decision is not meant to affect any right appointed counsel may have to claim compensation under the Criminal Justice Act for motions filed after final conviction on behalf of one's client.

counsel in these instances is a matter within the sound discretion of the court.

We think that an indigent's right to appointed counsel for a reduction of sentence motion should be restricted by the trial court to situations raising the kind of an issue, supported by specific factual allegations, wherein fundamental fairness requires the appointment of counsel if standards of due process are to be met. No such issue is raised here. Accordingly we hold that 18 U.S.C. § 3006A(c) (1970) does not require that counsel be appointed upon the defendant's request before the court can determine the substance of a Rule 35 motion which is filed after final conviction and that the motion before the trial court in this case, being patently deficient, did not present the sort of an issue requiring the appointment of counsel. No other issue being raised by this appeal, the order is

Affirmed.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7515

January Term, 1975

BEINE J. BURRELL,
a/k/a Ronald B. Burrell,
Appellant,

v.

UNITED STATES,
Appellee.

Appeal from the Superior Court of the District of Columbia, Criminal Division.

BEFORE: Nebeker, Yeagley and Harris, Associate Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the Superior Court of the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order on appeal herein denying appellant's pro se motion for reduction of sentence be, and the same is hereby, affirmed.

Per Curiam.

For the Court:
/s/ Alexander L. Stevas
Alexander L. Stevas,
Clerk.

Dated: January 30, 1975.
Opinion per Associate Judge J. Walter Yeagley.

SUPERIOR COURT FOR THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES :
:
v. : Criminal No. 65033-71
:
BEINE J. BURRELL, :
a/k/a Ronald B. :
Burrell,
Defendant.

ORDER

Upon consideration of defendant's motion for reduction of sentence and it appearing that the motion is filed within 120 days following dismissal of the appeal and the Court having had opportunity to review the presentence report as well as the memorandum of points and authorities in support of the motion and the other documents appended to the motion, it is by the Court, this 14th day of February, 1973,

ORDERED that the motion for reduction of sentence, be and the same, hereby is denied.

/s/ Sylvia Bacon
Associate Judge
D.C. Superior Court

Copies mailed to the
following on 2-14-73:

George F. Bason, Jr., Esq.
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Mr. Ronald B. Burrell
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Lewisburg, Pennsylvania 17837

APPENDIX B

Constitution of the United States, Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Constitution of the United States, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

18 U.S.C. 3006A (c):

> "A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings . . . ."

18 U.S.C. 3006A (d):

> ". . . . For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation proceeding or for representation provided under subsection (g) the compensation shall not exceed $250 for each attorney in each proceeding in each court."

Rule 35(a), D.C. Superior Court Criminal Rules (identical to Federal Criminal Rule 35):

> "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a man-

date issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law."

Rule 44, D.C. Superior Court Criminal Rules (identical to Federal Criminal Rule 44(a) except for the omission of the bracketed matter below):

"Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before [the federal magistrate or] the court [through appeal], unless he waives such appointment."

Supreme Court, U. S.
FILED
JUN 19 1975
MICHAEL RODAK, JR., CLERK

No. 74-1369

In the Supreme Court of the United States

OCTOBER TERM, 1974

BEINE J. BURRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1369

BEINE J. BURRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was entitled to the appointment of counsel to represent him on his post-appeal motion for reduction of sentence.

Following a jury trial in the Superior Court of the District of Columbia, petitioner was convicted of possessing a pistol without a license, in violation of 22 D.C. Code 3204. He was sentenced to three years' imprisonment to run consecutively to his sentence on an earlier felony conviction. Petitioner appealed from the conviction to the District of Columbia Court of Appeals, but then dismissed the appeal (Pet. App. 1a). Thereafter, he moved *pro se* under Rule 35(a), Super. Ct. Crim. R.,[1]

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[1]Rule 35(a), which is identical to Fed. R. Crim. P. 35, provides:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is

for reduction of sentence, and requested that the court appoint counsel. Without acting on the latter request, the trial court denied the motion. The District of Columbia Court of Appeals affirmed (Pet. App. A).

1. Petitioner contends (Pet. 4-7) that under the Sixth Amendment he was entitled to appointment of counsel.[2] A motion for reduction of sentence is addressed to the sound discretion of the trial court. *E.g.*, *United States* v. *Jones*, 490 F.2d 207, 208 (C.A. 6), certiorari denied, 416 U.S. 989; *United States* v. *Maynard*, 485 F.2d 247, 248 (C.A. 9); *Green* v. *United States*, 481 F.2d 1140, 1141 (C.A. D.C.). Such a motion is directed to "a sentence which has already become final in every respect" (*United States* v. *Behrens*, 375 U.S. 162, 165), and ordinarily requires neither a hearing nor the presence of the movant or his attorney. Fed. R. Crim. P. 35; *United States* v. *Jones*, *supra*, 490 F.2d at 208; *United States* v. *Maynard*, *supra*, 485 F.2d at 248; *United States* v. *Birnbaum*, 421 F.2d 993, 998 (C.A. 2), certiorari denied, 397 U.S. 1044.

As petitioner acknowledges (Pet. 4-5), this Court has never held than an indigent prisoner is constitutionally entitled to appointed counsel in seeking the discretionary relief authorized by Rule 35, and the holding of the court of appeals that petitioner was not so entitled does not conflict with the decision of any court of appeals. Moreover, that conclusion was correct and is supported by recent decisions of this Court holding that the Constitution does not oblige the government to appoint counsel for indigent convicts whose parole or probation is being

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imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

[2]Neither here nor in the court of appeals has petitioner challenged the trial court's denial of his motion for reduction of sentence (see Pet. App. 2a).

revoked (*Gagnon* v. *Scarpelli*, 411 U.S. 778, 787-791) or who are seeking discretionary review of their convictions. *Ross* v. *Moffett*, 417 U.S. 600. See also *Wolff* v. *McDonnel*, 418 U.S. 539, 569-570.

2. Petitioner also contends (Pet. 10-13) that he had a "due-process right to counsel" because his motion for reduction of sentence was based on his asserted rehabilitation and his eligibility for a work-release job if his sentence were reduced.[3] Since the court of appeals acknowledged the possibility that due process might in some circumstances require that trial courts, in the exercise of discretion, appoint counsel for an indigent defendant seeking reduction of sentence (Pet. App. 7a), the only question presented by the petition in this regard is whether on the particular facts of this case the trial court abused its discretion in declining to appoint counsel. The court of appeals correctly held that it did not, and that ruling does not warrant further review.[4]

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[3]Petitioner does not specify how he was denied an entitlement to liberty or property protected by the due process clause of the Fifth Amendment. Petitioner had no constitutional or statutory right to work-release (*United States* v. *Green*, *supra*, 481 F.2d at 1141), and the considerations underlying his motion are more properly addressed to the Board of Parole. See *United States* v. *Maynard*, *supra*, 485 F.2d at 248.

[4]Petitioner cites no significant prejudice as a result of the district court's failure to appoint counsel. The grounds on which he sought reduction of sentence, whether taken individually or collectively, did not compellingly justify such action, and petitioner tacitly concedes that the denial of his motion was within the court's discretion. That denial was presumably based, not on the absence of substantiation of petitioner's claims (the only purpose for which petitioner says an attorney was needed (Pet. 7)), but upon the court's decision, after "review[ing] the presentence report as well as the memorandum of points and authorities in support of the motion and the other documents appended to the motion * * *" (Pet. App. 9a), that those claims simply did not justify a discretionary reduction of sentence.

3. The court of appeals' rejection of petitioner's present[5] contention (Pet. 7-10) that he was entitled to appointment of counsel under the Criminal Justice Act, 18 U.S.C. 3006A, was correct, involves no conflict among the courts of appeals, and does not merit further review.[6]

The Criminal Justice Act[7] entitles an indigent criminal defendant to representation by appointed counsel "at every stage of the proceedings * * * through appeal, including ancillary matters appropriate to the proceedings."

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[5]In the court of appeals, petitioner (then represented by counsel) contended only that he was entitled on constitutional grounds to appointment of counsel; the court of appeals raised *sua sponte* the question whether he was entitled to counsel under the Criminal Justice Act.

[6]Petitioner also makes a conclusory assertion that he was entitled to appointment of counsel under "court rules" (Pet. 2, 7), apparently referring to Superior Court Rule 44, which closely follows Rule 44(a), Fed. R. Crim. P. (see Pet. 8). That contention, however, was not made below and is not properly presented by the petition. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2. In any event, the correctness of an interpretation of a local court rule by the highest court of the District of Columbia does not merit review by this Court (cf., *e.g.*, *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285), even if review of such a ruling would still be permissible. Cf. 28 U.S.C. 1257; *Palmore* v. *United States*, 411 U.S. 389, 395-396.

[7]At the time of petitioner's request for appointment of counsel, the pertinent provisions of the Criminal Justice Act were "applicable in the District of Columbia." 18 U.S.C. 3006A(*l*). Effective September 3, 1974, however, the Act was explicitly rendered inapplicable to the Superior Court of the District of Columbia, in view of the enactment of parallel provisions of the District of Columbia Code specifically concerning appointment of counsel in that court. 11 D.C. Code 2603, added by 88 Stat. 1091; see 18 U.S.C.A. (Supp. 1975) 3006A(1). Accordingly, the decision of the court of appeals in this case is unlikely to have a lasting effect upon the interpretation of the Criminal Justice Act in the District of Columbia.

18 U.S.C. 3006A(c).[8] Petitioner was represented by counsel "through appeal" and was entitled to no further representation under the Act. *Dirring* v. *United States*, 353 F.2d 519, 520 (C.A. 1), certiorari denied, 377 U.S. 1003.[9]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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[8]Petitioner does not explicitly rely upon the reference to "ancillary matters." As the court of appeals correctly noted (Pet. App. 6a), the legislative history of the addition of that language in 1970 reveals that it contemplated proceedings, such as *habeas corpus ad testificandum* to secure testimony and hearings as to mental competency to stand trial, that are "technically outside the scope of the trial proper" but are necessary "in defending the principal criminal charge * * *." S. Rep. No. 91-790, 91st Cong., 2d Sess. 6-7 (1970); H.R. Rep. No. 91-1546, 91st Cong., 2d Sess. 9 (1970).

[9]Petitioner's claim of conflict between the decision below and the interpretation given to the Criminal Justice Act by court administrative offices in compensating appointed counsel (Pet. 9-10) is unsound. As the court of appeals recognized (Pet. App. 6a, n. 6), the limitations on a defendant's entitlement to appointment of counsel under the Act are not necessarily the same as the limitations on services of counsel, once appointed, that are compensable under the Act.